

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF  
MASSACHUSETTS *ex rel.* MYKEL  
POWELL, *et al.*,

Plaintiffs,

v.

BRIAN HOLMES, *et al.*,

Defendants.

Docket No. 1:18-cv-11336-FDS

**MOTION TO INTERVENE OR OTHERWISE  
SPECIALLY APPEAR FOR THE LIMITED PURPOSE OF  
OPPOSING PLAINTIFFS' MOTION TO AMEND PLEADINGS**

The proposed police officer defendants<sup>1</sup>, who Plaintiffs attempt to implead via their Fourth Amended Complaint, respectfully request leave to specially appear or otherwise intervene for the limited purpose of opposing Plaintiffs' Motion for Leave to File a Fourth Amended Complaint (Dkt. 128, 129) (the "Motion to Amend"). The proposed police officer defendants specifically seek leave to make a special appearance because Plaintiffs—despite repeated efforts and more than sufficient opportunity—have failed to properly serve many of them. Further, the alleged claims against the proposed police officer defendants are irrefutably and admittedly futile. Consequently, the proposed police officer defendants seek leave to intervene or otherwise specially appear for the limited purpose of opposing Plaintiffs' Motion to Amend.

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<sup>1</sup> John Barbieri, William Jeb, Antonio Gomes, Jack Buckley, Justin Martel, Peter MacDonnell, Kevin McCaul, Richard Meehan, Joseph Desmond, James Moses, Scott Hodson, Allan Haskell, William Crocket, Chad Perry, and Gary Mansfield. Proposed defendants Robert Walsh and Timothy Chaffee are not currently represented by counsel, but the arguments herein apply equally to them.

FRCP 24(b) allows third parties to intervene in a matter where the third parties have “a claim or defense that shares with the main action a common question of law or fact.” Here, the proposed police officer defendants have defenses to Plaintiffs’ Motion to Amend which share common questions of law and fact with the main action. These include questions regarding the futility of Plaintiffs’ claims, the delays caused by Plaintiffs and their failure to properly prosecute their claims, Plaintiffs’ failure to properly serve at least some of the proposed police officer defendants, and the prejudice that the proposed police officer defendants and other parties would suffer if Plaintiffs’ Motion to Amend is granted. These defenses are set forth with greater detail in the Opposition to Plaintiffs’ Motion to Amend, attached hereto as Exhibit 1, and incorporated here by reference.

The proposed police officer defendants seek leave to specially appear<sup>2</sup> or otherwise intervene for the limited purpose of opposing Plaintiffs’ Motion for Leave to File a Fourth Amended Complaint. By doing so, the proposed police officer defendants make no concession that they should be considered or included as defendants in this matter or that they were properly served and brought before this Court—in fact, the proposed police officer defendants argue to the contrary.

For these reasons, and the reasons set forth in greater detail in the Opposition to Plaintiffs’ Motion to Amend, the proposed police officer defendants should be granted leave and

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<sup>2</sup> The proposed police officer defendants acknowledge that the need to “specially appear” may no longer be necessary, *deLeo v. Childs*, 304 F. Supp. 593, 599 n. 2 (D. Mass. 1969) (“[Rule 12\(b\), Fed.R.Civ.Proc.](#), renders unnecessary the former practice of entering a ‘special appearance’ in order to preserve exceptions to jurisdiction. 2A Moore’s Federal Practice, P12.02, p. 2226, n. 4 (1968); Wright, *Federal Courts*, 66, p. 243 (1963).”), and invokes this language only in an abundance of caution.

permitted to intervene for the limited purpose of opposing Plaintiffs' Motion for Leave to File a Fourth Amended Complaint.

Respectfully submitted,

By Defendants:

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DATE: October 8, 2021

### **COMPLIANCE WITH LR 7.1**

Pursuant to Local Rule 7.1, the undersigned conferred with counsel for Plaintiffs in advance of filing this motion. The parties were unable to resolve this matter.

/s/ William F. McGonigle

### **CERTIFICATE OF SERVICE**

I hereby certify that on October 8, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ William F. McGonigle